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(Consolidated with No. 95-227)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

STEVEN R. SHAPIRO
MARJORIE HEINS
American Civil Liberties Union Foundation
132 West 43d Street
New York, New York 10036
(212) 944-9800

CHARLES S. SIMS
Counsel of Record
PETER J. W. SHERWIN
Proskauer Rose Goetz & Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS DAETC AND ACLU

By conceding for the first time that § 10's provisions authorizing content-based censorship must be measured against the First Amendment — an unavoidable concession, given the clarity with which this Court has said that any content-based law passed by Congress is presumptively invalid — the government has removed the ground on which the court of appeals upheld §§ 10(a) and (c) of the 1992 Cable Act. Forced to reach the merits, and cognizant that it is extraordinarily rare for a statute to be upheld on strict scrutiny, the government now tries to avoid it, seeking "reasonableness" review of § 10's provisions that cause the most harm to free speech and "intermediate" review of § 10(b).

Neither of those standards finds support in this Court's cases, and both are fundamentally inconsistent with the constitutional guarantee of free speech. Section 10 cannot survive strict scrutiny because it will lead to the suppression of far more speech than is warranted, unjustifiably applies only to access programmers (leaving cable operators free to program identical content on their own channels), and adopts means that are far more restrictive than necessary, given the availability of lockboxes and customer-requested blocking or scrambling that will protect children equally well. Focused on "offensiveness" alone, § 10 is also unduly vague and susceptible to the kind of viewpoint-based censorship that requires procedural safeguards and judicial superintendence wholly absent here.

I.

SECTIONS 10(A) AND (C) VIOLATE THE FIRST AMENDMENT.

A. The Government Has Conceded that Not Reaching the First Amendment Challenge Presented Was Error and that No Threshold State Action Inquiry Precludes Reaching the Validity of Sections 10(a) and (c).

Petitioners challenge the constitutionality of § 10's censorship scheme, which Congress established and the Commission implemented. Congress requires cable operators either to ban or to block the content-based category of "indecent" programming on leased access channels (§§ 10(a) and 10(b)) and authorizes cable operators to ban "indecent" programming on PEG access channels (§ 10(c)). Petitioners have neither sued particular cable operators nor challenged particular decisions made under § 10.

1. Previously, the government's sole defense of §§ 10(a) and (c) was that those sections are not subject to constitutional scrutiny because the cable operators who will be doing the censoring are not state actors. *E.g.*, Opp. Pet. 12 ("the mere enactment of those provisions does not limit the speech of any individual or entity. . . . The question presented, therefore, is whether such decisions by cable operators would be properly attributable to the government"); *id.* at i ("Whether a cable operator's decision to prohibit indecent programming . . . is 'state action' attributable to the federal government"). Accordingly, the government never identified any standard of First Amendment scrutiny to be applied to §§ 10(a) and (c); its contention was rather that no review was necessary.

The en banc court of appeals adopted the government's analysis and concluded that, "[b]ecause we find no state action here . . . , we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c)." Pet. 31a. Petitioners' opening brief (at 14-21) demonstrated that no case in the history of this Court has ever held that any law facially challenged, much less a content-based law, is not subject to constitutional review for lack of "state action."

The government has now effectively abandoned its prior position and conceded that all of § 10 is subject to constitutional review. Gov't Br. 20[1] ("although the conduct of cable operators in prohibiting indecent programming under Sections 10(a) and 10(c) is not properly attributable to the federal government, the statutory grant of permissive authority to cable operators to do so *must be consistent with the First Amendment*") (emphasis added); *id.* at 12 ("The enactment and governmental implementation of the statute are undoubtedly state action"); *id.* at 24 ("state action does inhere in Congress's enactment of a statute giving operators such editorial freedom"). Accordingly (and tellingly) the government rephrased its first question presented, focusing (as petitioners do, but as the court of appeals did not) on the merits of the challenge actually presented: "Whether Congress violates the First Amendment by

[1] References to petitioners Denver Area Educational Telecommunications Consortium Inc. and ACLU's opening brief are given as "DAETC Br.," and to the federal respondents brief as "Gov't Br."

permitting — but not requiring or encouraging — cable operators to prohibit indecent programming . . . ." Gov't Br. i.[2]

In short, although it does not forthrightly say so, the government agrees that the en banc court of appeals' decision not to reach the constitutionality of §§ 10(a) and (c) was error.

2. The government's recognition in Point I.B of its brief that §§ 10(a) and (c) must be measured against the First Amendment has orphaned its argument in Point I.A that cable operators' decisions should not be "attributed to the government" and has confirmed that consideration of that non-issue is unnecessary. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Neither agreement nor disagreement with the argument in Point I.A alters the necessity, now conceded, to decide whether §§ 10(a) and (c) violate the First Amendment.

Nothing in the government's brief contradicts petitioners' showing that, when a law (even a permissive law) is challenged as violative of the Constitution, the question is whether the law draws constitutionally forbidden lines or will have impermissible consequences, not whether the actors ultimately causing the harm are state actors; indeed, that latter issue is simply irrelevant. For example:

- In both *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), the plaintiffs challenged the constitutionality of permissive laws, under whose authority the defendants acted, and prior to whose passage the defendants would not have been permitted to act. The Court did not pause to consider whether Teleprompter or the employers in *Hanson* were state actors, as petitioners noted and as the government has not disputed. DAETC Br. 17, 23; *see* Gov't Br. 12-28. Regardless of that

[2] Amicus curiæ Time Warner Cable has noted with some anger the government's concession that, regardless of whether cable operators' decisions under §§ 10(a) and (c) are state action, this Court must reach the First Amendment analysis of those statutory provisions. Motion of Time Warner Cable for Leave to Argue at 4.

non-issue, both statutes were before the Court and subject to constitutional review because they were a but-for cause of the injury. Prior to enactment of the laws in question, Ms. Loretto and the railroad employees had legally enforceable statutory rights: not to be trespassed on without compensation, and not to be forced to join a union. After enactment, private parties were permitted to invade those rights.[3]

- In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) — a suit against state officials seeking a declaration that the statute authorizing, but not requiring, churches to veto the licensure of alcoholic beverage sale within 500 feet of church property — the Court proceeded to the merits without pausing to consider whether churches are state actors (undoubtedly they are not). The governmental action before the Court was the statute itself (constrained by the Constitution and therefore necessarily subject to constitutional review), which was claimed, and found, to draw a line forbidden by the First Amendment.

- In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court again did not pause to consider whether the realty agent who had refused to show the plaintiff houses on a for sale list was a state actor (undoubtedly she was not), because the challenge was to the law that allowed discrimination by insulating it from challenge, not to any private conduct.

Similarly, this case requires a decision on the merits of whether the challenged statutory scheme — prior to whose enactment cable operator interference with speech on access channels was forbidden — exceeds constitutional limitations, but does not require an unnecessary excursion into whether the newly permitted actions are performed by state actors.

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[3] To the extent that the government criticizes petitioners for suggesting that *Hanson* renders all decisions by private employers to enter into or enforce union shop agreements attributable to the government, and by extension renders all decisions of cable operators state action, it tilts at windmills. Gov't Br. 20. Petitioners have not so contended and indeed see no occasion for addressing that issue in this case, as any consideration of it would be *dicta*.

B. Sections 10(a) and (c) Are Invalid under Strict Scrutiny Because They Are Content-Based and Speaker-Based Authorizations to Censor Whose Practical Effect Will Be a Diminution of All Speech Cable Operators Could Reasonably Term Offensive.

Sections §§ 10(a) and (c), on their face and in practical impact, are "regulations that *suppress, disadvantage, or impose differential burdens* upon speech because of its content"; they are therefore subject under existing authority, at a minimum, to "the most exacting scrutiny." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (emphasis added); *see* cases cited at DAETC Br. 14, 38-39.[4] Neither the Commission nor the court of appeals ever questioned that § 10 is subject to strict scrutiny to the extent it is subject to any review (*see* Pet. 131a-40a; Pet. 32a), and the government now recognizes that §§ 10(a) and (c) are content-based regulations (Gov't Br. 24-25).

This Court has held that a ban of "indecent" speech cannot survive strict scrutiny. *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126-27 (1989); *see FCC v. Pacifica Found.*, 438 U.S. 726, 750 & n.28 (1978) (implying that a ban on broadcasting indecent language would violate the First Amendment). Indeed, for this very reason, the government conceded at oral argument before the court of appeals that, if §§ 10(a) and (c) involve state action, they are constitutionally invalid (Pet. 104a n.9, 110a n.15, 111a n.16), and it does not even now argue that they can survive strict scrutiny (*see* Gov't Br. 24-28).

Sections 10(a) and (c) fall under *Sable* because they authorize, and are likely produce for millions of households, a complete ban on access channels of programming that might be considered "indecent." Far from generally restoring editorial discretion,

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[4] The government has failed to respond to petitioners' contention (at 38-39) that, because §§ 10(a) and (c) authorize the prohibition of speech based solely on content, they should be held per se invalid without further inquiry. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring).

Congress expressly and with pinpoint precision armed cable operators with "authority to enforce" a written policy "prohibiting" access programming of specified disfavored content. Pet. 126a; *see* DAETC Br. 14-15. In every community in which a cable operator implements a policy prohibiting the cablecast of any access programmer speech the operator "reasonably" deems to be "indecent," the effect of this delegation of authority will be indistinguishable from a direct congressional ban on indecent speech, whose invalidity would seem plain under *Sable*. The record shows that cable operators are planning to adopt such bans; a result virtually foreordained by their lack of commitment to the programmer speech being censored, their concern for liability, their burdensome alternative in § 10(b), and their strong economic incentive to transfer viewership to operator-controlled channels.[5]

C. The Standard Applicable to Sections 10(a) and (c) Is Not the Proposed "Reasonable and Viewpoint-Neutral" Standard.

In order to evade the invalidation of §§ 10(a) and (c) that the government conceded below strict scrutiny would entail, the government now advances the afterthought that §§ 10(a) and (c) were enacted to protect the expressive rights of cable operators and that "indecency" can assault the sensibilities of those who wish to avoid it; therefore strict scrutiny is not required and those provisions are valid so long as they are reasonable and viewpoint-neutral. Gov't Br. 24-28. The government's proposed standard is contrary to *Turner*, *Simon & Schuster*, and *Sable*, and its premise is mistaken.[6]

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[5] DAETC Br. 7-8 & n.9; Acton Corp, JA 1-2; InterMedia Partners, JA 77-78; Community Antenna Television Ass'n, JA 175-76; InterMedia Partners, JA 228-29; *see* DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.09[4][b][i], at 6-102.1 ("operators would have a strong incentive to prohibit far more access programming than necessary") (1995); *id.* § 6.09[4][b][ii][C], at 6-102.6 to 102.8.

[6] Even respondent National Cable Television Ass'n, Inc. agrees with petitioners that "[t]his Court has made clear . . . that indecency is (continued...)

1. The government's premise is that Congress adopted §§ 10(a) and (c) for a structural purpose, namely to protect "the expressive rights of cable operators." Gov't Br. 24; *see also id.* at 28. However, Congress expressly asserted a very different purpose (one that focused on the communicative impact of certain disfavored speech): "Children's Protection From Indecent Programming on Leased Access Channels." Pet. 126a.[7] Congress nowhere described any interest in "restoring editorial discretion" to cable operators over access channels, which would be an oxymoron in any event because access channels by definition are not (and never were) editorially controlled by cable operators, who function on those channels merely as conduits. *See* DAETC Br. 3 n.1.[8] Both § 10's title and structure confirm in multiple ways that protecting "the expressive rights of cable operators" was not Congress' purpose.[9] The authority doled out in §§ 10(a) and (c) was the

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[6](...continued)
protected speech and, indeed, that strict scrutiny applies broadly to strike down content-based efforts to single out 'indecent' but non-obscene speech for government-imposed bans or *other direct impairments of private choices*." NCTA Br. 6 (emphasis added).

[7] The court of appeals described Congress' interest in § 10 as "'protecting the physical and psychological well-being of minors.'" (Pet. 32a (citation omitted).) Petitioners have recognized for the purpose of these proceedings Congress' asserted § 10 interests of "enabling parents to protect their children from harm and . . . directly protecting children from harm in circumstances where parental supervision is likely to be systematically or structurally impracticable." DAETC Br. 40.

[8] The assertion of amicus curiæ Time Warner Cable that leased access did not exist prior to 1984 (at 14) is patently false, as it surely knows. *See, e.g.*, N.Y. EXEC. L. § 829.

[9] Any notion that "restoring editorial discretion" is the purpose behind §§ 10(a) and (c) is dispelled by the fact that §§ 10(a) and (c) narrowly delegate to cable operators only the "authority to enforce" a policy prohibiting only one specific content-based category of speech that Congress wishes to suppress. Section 10(b), which requires cable operators to block unprohibited leased access programming, is also hardly indicative of a purpose of restoring operators' editorial freedom.

means Congress used to diminish the quantity of unwanted speech (assertedly to protect children), not an end in itself.[10]

2. None of the cases cited by the government (at 25) supports the notion that strict scrutiny is only applicable for viewpoint discrimination, and this Court's cases are directly to the contrary. *See, e.g., Simon & Schuster*, 502 U.S. 105; *Carey v. Brown*, 447 U.S. 455 (1980); DAETC Br. 14 & n. 15, 16 n.21. If the law were otherwise, Congress could outright ban all speech on particular subjects — nuclear testing, for example — subject only to "reasonable basis" scrutiny.

Nor is the government correct in considering § 10 not viewpoint-based. Gov't Br. 26. The programming that cable operators are likely to censor under §§ 10(a) and (c) is not distinguishable as a neatly definable subject matter, like the "music or sports" or "politics and world events" categories that the government's brief imagines. "Indecency" can be used, has been used,[11] and (considering this nation's well-known struggles over cultural freedom or regimentation) will undoubtedly be used again, as an excuse to censor valuable programs on such subjects as abortion, AIDS, safe-sex education, controversial art, and breast self-examination.

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[10] Congress delegated censorship power to cable operators expressly to achieve its asserted interest in limiting "indecency" on access channels without triggering constitutional scrutiny. *E.g.*, 138 CONG. REC. S649 ("[Indecent and other undesired programming] should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it") (daily ed. Jan. 30, 1992). Editorial discretion is not established by the power solely to censor or block, but necessarily entails the right to select and edit — to speak. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[11] For example, amicus curiæ Time Warner Cable has already attempted to enforce a § 10(a) written policy and in so doing initially decided to scramble several programs by Gay Cable Network even though it later admitted that none of them contained "indecent" material. (Sept. 12, 1995 and Sept. 13, 1995 declarations of Clarence Grier in opposition to motion for preliminary injunction in *Goldstein v. Manhattan Cable Television, Inc.*, 90 Civ. 4750 (LBS) (S.D.N.Y.).)

In view of the breadth of the "indecency" definition, the "wide discretion" accorded cable operators to censor even more broadly under a "reasonable belief" in indecency standard, and the license to censor without requirement of prompt judicial or even administrative superintendence (*see* Point III below), §§ 10(a) and (c) are so susceptible to viewpoint-based enforcement that they necessarily draw the most exacting scrutiny. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762-69 (1988).[12]

3. To rationalize its "reasonableness" standard, the government also asserts that indecent programming is an "'assault' on the sensibilities of those who wish to avoid it" (Gov't Br. 27) and implies that §§ 10(a) and (c) represent a proper remedy (*id.* at 26-28.)

No one doubts that people should be allowed to avoid speech that they find offensive or an "assault" on their sensibilities, and *Sable* and numerous other cases make plain that that concern, if it were one underlying § 10, would be relevant to consideration of the merits. There is, however, no precedent for using it to reduce the scrutiny afforded as well, which would be an odd and unnecessary form of "double counting."

Lowering the scrutiny afforded protected speech would be particularly destructive of free speech here, for whatever unwilling viewer problem exists can be effectively addressed by a myriad of

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[12] A major part of the problem is that neither the cable operator nor the access programmer can know what the term "indecency" covers. *E.g.*, InterMedia Partners, JA 228-31 (will "prohibit *potentially* obscene and indecent material" and will review "any program material which might conceivably be construed as obscene or indecent"). The assertion that the Commission has limited "indecent" speech to "explicit and graphic descriptions of sexual activities" (Gov't Br. 46 n.25) is irrelevant, for that does not bind cable operators, the Commission, or the courts. The Justice Department's wish that Congress and the Commission had said something more specific than "patently offensive" cannot cure a facially vague and overbroad law. *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967) ("'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms'") (citation omitted) (modification in original).

far less restrictive alternatives than general prohibition, such as customer-requested blocking or lockboxes. *E.g.*, Telecommunications Act of 1996, Pub. L. No. 104-___, § 504 (Gov't Supp. 1a). When coupled with disclosure of the nature of programming on each cable channel (with descriptive information, not conclusory, denigrating labels like "indecent"), viewers can tailor what they bring into their home through cable.[13]

Many types of protected speech assault or offend. Some feel "assaulted" by inane situation comedies, others by football, by open-heart surgery on The Discovery Channel, by violent programming, by offensive uses of the flag, or by jingoistic news reporting. That speech has the ability to "assault" one's sensibilities does not relegate it to lesser First Amendment protection.

II.

SECTION 10(B) VIOLATES THE FIRST AMENDMENT.

A. Section 10(b) Is Subject, at a Minimum, to Exacting Scrutiny.

The government agreed below that strict scrutiny applies to § 10(b)'s blocking scheme, and the court of appeals so held (Pet. 32a-36a), probably for the good reason that all nine members of this Court agreed in *Turner* that content-based regulations of speech on cable television would be subject at a minimum to strict scrutiny. Undeterred, the government now argues (for the first time) that, because the content being regulated is "indecent" programming,

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[13] The government's equation of indecency on cable access with nudity on highway billboards not only ignores *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), which *protected* such displays, but also creates a false analogy. Although a driver cannot know in advance what may be displayed in public on a billboard in order to avoid it, cable viewers can be fully informed about the nature of programming on the cable system affirmatively brought into the home, and the technology exists on all cable systems to block any channel upon request. Indecency on access channels is far more like magazine nudity, where an informed reader can tell from the cover what may be found inside and avoid it if so inclined.

§ 10(b) is subject only to the lower standard that (it asserts) this Court applied in *Pacifica*. Gov't Br. 28-33.

This last-minute effort to reduce the level of scrutiny (a sure sign that § 10(b) would fail strict scrutiny) ignores, or finds spurious grounds for distinguishing, the unbroken line of authority holding that laws that regulate on the basis of content, or that directly and substantially burden free expression, are subject for either reason to outright invalidation or, at a minimum, the most "exacting scrutiny." *E.g.*, *Turner*, 114 S. Ct. at 2459; *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989); *see* DAETC Br. 14 & n.15, 38-39.

The government seeks a "more lenient standard of review," which it dubs the "*Pacifica* doctrine." Gov't Br. 28, 32-33. But *Pacifica* styled itself, and subsequent cases have treated it, as a limiting case (*see* DAETC Br. 32-34); "the verge," not a "platform for yet further steps."[14] The opinions in that case can be searched in vain for any hint that the Court there adopted a distinctive, "lenient" standard of review for any class of First Amendment cases. (For all those opinions show, strict scrutiny was applied.) As petitioners showed in an argument that the government simply ignored, *Pacifica* addressed neither the standard of review nor the constitutionality of a regulation of "indecent" *programming* and resolved only the narrow question of whether the Carlin monologue's use of seven dirty *words* as broadcast that particular day and time could be the basis for placing a critical letter in the licensee's file. *Compare* DAETC Br. 32-36 *with* Gov't Br. 29-33.

Any effort to discern a lesser standard of review for indecency regulation in *Pacifica* would founder on *Sable*'s holding that the government may not "regulate the content of constitutionally protected speech [such as indecent speech] in order to promote a compelling interest" unless it "chooses the least restrictive means to further the articulated interest." 492 U.S. at 126.

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[14] *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2551 (1995) (Souter, J., dissenting) (quoting Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971)); *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983); *Pacifica*, 438 U.S. at 750.

In attempting to carve out an indecent programming exception to *Turner* based on *Pacifica*, the government relies on two factors: cable's presence in the home, and its accessibility to children. Gov't Br. 29, 30. Although cable does have those two factors in common with the broadcast media, so does the telephone medium, which was under consideration in *Sable*, and so also do others.[15] Reducing the level of scrutiny (a bulwark of free speech protection) on the basis of these factors is utterly inconsistent with the preservation of free speech; it would require overruling not only *Sable* but also *Turner*, to say nothing of *Stanley v. Georgia*, 394 U.S. 557 (1969). Neither *Pacifica* nor reason supports such a result, especially so long as the definition of "indecency" is so broad as to sweep up not only speech at the border of obscenity, but also speech lacking any prurient appeal and containing serious artistic, educational, scientific, and social value.

To the extent that a refusal to overextend *Pacifica* may lead to different regulation of "indecent" programming on broadcast television and on cable (Gov't Br. 31), that disparity is one to which this Court has long ago reconciled itself. *Turner* is just the most recent in a line of cases refusing to treat the broadcast regulation doctrine as a stepping stone for reducing First Amendment protection in other media.[16]

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[15] THE NEW YORKER has lately reproduced Richard Avedon photographs of nude women, showing in one issue bare-breasted Las Vegas showgirls. These magazine issues meet all of the government's indicia warranting "lenient" review for censorship, as they undoubtedly confront many readers with young children with, in the government's colorful if leaden phrase, "unexpected components of a highly diversified programming package" (Gov't Br. 30).

[16] Different regulation itself can hardly be a dispositive problem here, for, if the government were to prevail, (1) cable operators would be free to show to children on commercial channels programs comparably "indecent" to those prohibited entirely or blocked on access channels, and (2) cable operators would be required to block on an access channel the very "indecent" program that, if it were broadcast by a network during safe-harbor hours, they would be required to carry.

B. Section 10(b) Cannot Survive Exacting Scrutiny.

The government's application of strict scrutiny to § 10(b) (Gov't Br. 33-41) fails to address much of petitioners' argument, *e.g.*, that § 10(b) reaches far more speech than necessary (*see* DAETC Br. 42), and gets wrong what it does discuss.[17]

1. The government's labored effort to show how carefully Congress matched means to ends is a doomed enterprise, given the fact — conveniently ignored — that § 10 was offered as floor amendments on the last legislative day before the Senate approved its bill, was never sent to any committee, and was never the subject of any congressional hearings or findings. It should not be surprising if, as turned out, the result was not the precisely tailored legislation required in this area.

Nor is the misconceived blocking scheme well served by the government's defense. For example, the government contends that § 10(b) advances the interest of "helping parents exercise 'authority in their own household to direct the rearing of their children'" (Gov't Br. 33), without noticing that that interest is directly thwarted by § 10(a), which allows cable operators to foreclose parents' decisions. (This contradiction augments the doubt, already suggested by the minutes-long legislative history, that Congress had any such interest in mind.)

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[17] For example, the government belittles § 10(b)'s underinclusiveness by resorting again to a "one step at a time" argument (Gov't Br. 41-43), which is inapplicable to speech regulation, without confronting the constitutional problem of regulating "indecent" speech only on leased access channels. *See* DAETC Br. 47-48; BRENNER, CABLE TELEVISION § 6.09[4][b][ii][C], at 6-102.7. Section 505 of the Telecommunications Act does not remedy § 10's underinclusiveness because it only applies to channels "primarily dedicated to sexually-oriented programming." Gov't Supp. 2a. Petitioner DAETC, as well as PEG programmers, are surely not "primarily" dedicated to sexually-oriented programming; nonetheless, only their programming, and not that of Tele-Communications Inc. or Time Warner Cable, must be blocked or scrambled if "indecent."

Similarly, instead of forthrightly conceding that Congress' goal was to protect children whose parents would not want them to see such speech — an interest that is easily served by far less restrictive means — the government has done precisely what New York State did (and was condemned for) in *Simon & Schuster*, 502 U.S. at 120: "taken the effect of the statute and posited that effect as the [state government's] interest." Here, the Court is implausibly told that Congress enacted § 10(b), notwithstanding the availability of numerous ways parents can keep unwanted access (or other) cable programming from their children, principally to aid "the innumerable parents who — through absence, distraction, indifference, inertia, or insufficient information — would make no affirmative choice at all." Gov't Br. 37.

Given all of the means outlined in the briefs of both groups of petitioners — and the additional one in § 504 of the Telecommunications Act of 1996 whereby cable operators are required to, "upon request . . . , without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying [cable] programming so that one not a subscriber does not receive it" (Gov't Supp. 1a) — one thing is clear: any parent has or can easily obtain the tools and information necessary to keep access programs out of their households, if that is their choice.

The government's jerry-rigging of the interest underlying § 10 reveals its true argument: *all* adults must be denied the right to view any "indecent" leased access programs (if they do not want to send in "please give me the indecency channel" postcards), because *some* parents either deliberately or negligently will not use the tools already at hand (monthly inserts from the cable company, lockbox instructions, newspaper articles, telephone calls to the cable company) that will allow any parent to protect his or her children from unwanted speech. Moreover, even adults who, although initially disinclined to send in a blanket request for "indecency," later decide to seek access to a particular program scheduled to be cablecast in the next days or weeks must also (in all likelihood) be denied access to such a program.

Where the government's interest can be effectively met with means readily at hand, the First Amendment precludes more

restrictive content-based regulation that results in the suppression of speech to willing listeners, which suppression can be deemed "necessary" only because of "absence, distraction, indifference, inertia, or insufficient information" (Gov't Br. 37). The principle of *Butler v. Michigan*, 352 U.S. 380 (1957), requires no less.[18]

2. Notwithstanding this Court's holding in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), that requiring affirmative requests for protected speech is never the least restrictive means (*see* DAETC Br. 43-45), the government would limit *Lamont* to core political speech (Gov't Br. 35). Nothing in *Lamont* supports that limitation, and *Sable*, 492 U.S. at 126, plainly holds that "indecent" speech is entitled to full First Amendment protection.

The contention that § 10(b) "poses no threat of stigma or intimidation" blinks reality. Gov't Br. 35. For many — for judges, clerics, those seeking political careers, teachers of young children, and those in small towns, among others — the prospect of creating a written request for "indecent" speech would be precisely the kind of barrier that *Lamont* forbids.[19]

3. In the end, the government's argument is indistinguishable from that it advanced (unsuccessfully) in *Sable*: when marginal gains in effectiveness are weighed against harm to free speech interests, the former always wins. *See* Gov't Br. 36-40. However, the First Amendment makes a different choice. *Sable*, 492 U.S. at 128-31; *id.* at 132 (Scalia, J., concurring).

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[18] The very fact that cable is in the home, rather than in public, demonstrates the government's lesser interest here in directly protecting children. Although this Court recognized the legislatures' expressly stated interests in protecting children in *Sable*, 492 U.S. 115, and in *Ginsberg v. New York*, 390 U.S. 629 (1968), both of those cases involved exposure to speech *outside* of the home where parents necessarily had less ability to control the speech to which their children would be exposed.

[19] For proof of the stigma and condemnation that those seeking access would risk, see generally the briefs of amici curiæ National Family Legal Foundation, Morality in Media, Inc., and the Family Life Project of the American Center for Law and Justice.

Nor has the government explained why the thirty-day waiting period is least restrictive when cable operators currently have the ability to unscramble immediately; indeed, it virtually concedes that the delay is unjustifiable. Gov't Br. 41 n.21.

4. The government entirely ignores the separate burdens that the blocking scheme imposes on leased access programmers. For example, the Commission's implementation of § 10(b) permits cable operators to expel permanently leased access programmers from their systems for failure "correctly" to certify programming as "indecent." 47 C.F.R. § 76.701(f), Pet. 172a. As *Pacifica* itself confirmed, lesser measures, such as moderate fines, warning letters, or admonitions, would suffice without the over-deterrence that § 76.701(f) will cause. 438 U.S. at 735-38.

III.

SECTION 10 IS VAGUE AND LACKS PROCEDURAL SAFEGUARDS ESSENTIAL TO ENSURE THAT ONLY SPEECH CONSTITUTIONALLY SUBJECT TO REGULATION IS CENSORED OR BLOCKED.

Obscenity law from the late 1940's to *Miller v. California*, 413 U.S. 15 (1973), is largely the story of the successful development of two tools — vagueness doctrine and certain required procedural safeguards — to ensure that any regulation or prohibition of speech applies only to speech that is not constitutionally protected or that actually causes harms the government can seek properly to avoid. The government's response to petitioners' vagueness/procedural safeguards argument (Gov't Br. 43-46) confirms the compelling need for this Court to revisit and apply those tools. It cannot be that means developed to ensure that protected speech would not be suppressed in the name of obscenity regulation suddenly become irrelevant when protected speech faces that same risk of suppression in the name of "indecency."

1. No case supports the assertion that this Court has made the "judgment that the social necessity of subjecting indecency . . . to special regulation outweighs whatever unavoidable indeterminacy inheres in any definition of" such expression. Gov't Br. 45. To the contrary, petitioners showed (and the government does not dispute) that this Court has never passed on whether the definition

of "indecency" used in this scheme is void for vagueness, having declined to do so in *Pacifica*. *Compare* DAETC Br. 32-36 *with* Gov't Br. 43-46. The three-part *Miller* test is necessarily more limiting than a test that uses only one (and the most purely subjective) of *Miller*'s three elements.

Pacifica concluded only that a proscription of "indecent language" clearly enough reached seven dirty words uttered repetitively in the afternoon to warrant a warning letter and, with the guidance of that decision, could be used to warrant fines against others in the future. 438 U.S. at 750. That hardly amounts to this Court's considered "judgment" that Congress cannot do better in the service of protecting children than craft a statute phrased in terms of "patent offensiveness" to adults, especially where the definition is used for censorship, not just a warning.

2. The government also fails to address petitioners' showing that, when the interest is in protecting children, it is perverse to focus on "patent offensiveness" to *adults*. *Compare* DAETC Br. 27-32, 42 *with* Gov't Br. 43-46. Congress can serve its interest far more precisely by focusing on specific harms to children and by eliminating the baggy ambiguity of a definition that is too easily used as a basis for censoring, for example, any photograph or verbal description of breasts or buttocks.

Congress could also specify factors necessary for a finding of indecency (*e.g.*, prurient appeal) or disqualifying factors (*e.g.*, serious value). Although still not perfectly precise, these would measurably reduce § 10's vagueness by placing clearer limits on the "wide discretion" accorded cable operators through a standard that at its birth was expressly declared probably insufficient as a basis for a ban on protected speech, *Pacifica*, 438 U.S. at 756-57 (Powell, J., concurring). Access programmers would obtain meaningful security with respect to the continued development and dissemination of important and valuable programs on such topics as AIDS, breast, prostate, or testicular cancer, safe-sex education, or photography by Nan Goldin, Robert Mapplethorpe, Cindy Sherman, and many other highly regarded but controversial artists.

The government has not even tried to dispute the contention that § 10's definition leaves access programming at high risk of being suppressed by cable operators under the present capacious definition, even though such suppression would never be upheld by this Court. *See* DAETC Br. 29; *see generally* Brief of amicus curiæ Ass'n of Am. Publishers, Inc. That risk should be more than sufficient basis for finding § 10 impermissibly vague.

3. The key problem with § 10, which the government slides over when it says that there is little value in "indecent" speech, is that the only portion of the definition that prevents it from reaching *all* nudity and *all* but the most closeted references to sexuality is "patent offensiveness." Offensiveness is a wholly subjective term that this Court has repeatedly held an insufficient basis for speech regulation; one that leads inexorably to over-censorship, over self-censorship, and viewpoint-based censorship. DAETC Br. 29.

The government seems confident that "indecency" reaches only "explicit and graphic descriptions of sexual activities." Gov't Br. 46 n.25. But nothing in the definition of "indecency" justifies that confidence by confining cable operator censorship (much less hostile cable operator censorship) within circumscribed bounds.[20]

4. Nor, finally, does § 10 contain procedures, as required by the First Amendment, to confine censorship to speech whose suppression could be thought genuinely to advance the purpose underlying § 10 (avoiding harm to children). The government would have this Court disregard the vagueness of authorizing cable operators to censor what they "reasonably believe" to be "indecent" in reliance

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[20] The government cites Commission decisions, which show what has been found indecent, but which provide no indication of any outer limits or any restriction of "indecency" to only speech that would harm children or that has a prurient intent. Gov't Br. 46 n.25. Nothing in those decisions would restrain a cable operator from censoring a documentary on the recent exhibition entitled "Feminine/Masculine: The Sex of Art" at the Pompidou Centre in Paris, the film *Carnal Knowledge*, or a program on women's health issues demonstrating breast self-examination, and nothing therein would make irrational a programmer's self-censorship of such programs in order to avoid having its access terminated.

on the Commission's asserted "long-standing caution in this area." Gov't Br. 46. But § 10's very structure bars such reliance, because it entrusts the power to blank out access programming not to the Commission after hearings, but to the cable operators either unreviewably or with such inadequate, delayed review (*e.g.*, in state court breach of contract actions) as to be wholly insufficient protection of free speech. *See* Pet. 166a-68a, 194a.

The Commission's asserted "caution" is irrelevant when it is cable operators who will be censoring on a "reasonable belief" standard, thereby yielding a far broader scope (but indeterminately so) for "indecency" than the Commission's application of the underlying standard. DAETC Br. 31. Finding comfort in the Commission's "caution" is particularly perverse when one of the reasons this Court could safely not reach the vagueness challenge in *Pacifica* was that the Commission has no authority to censor speech in advance; its only power is retrospective, to consider, after hearings, speech that has already occurred. 438 U.S. at 735-36, 742. Indeed, the Court stressed that it was approving the use of "indecency" only as a basis for a warning. *Id.* at 742, 750.

Unlike the regime considered in *Pacifica* and subsequently by courts of appeals, "indecency" can be used under § 10 to censor speech in advance, and the Commission does not control those applications. (To the contrary, it was expressly denied such control in the hope of insulating §§ 10(a) and (c) from judicial review.)

The government has not disputed petitioners' showing that access programmers and viewers have no recourse to the Commission when they complain of undue censorship under §§ 10(a) and (c). *Compare* DAETC Br. 9 n.10 *with* Gov't Br. 43-46. Nor has it answered petitioners' demonstration that §§ 10(a) and (c) authorize the censorship of protected speech of access programmers — permanently denying it to viewers who would have liked to see it, and indeed to many asking to see it (because of the 30-day turn-on delay) — without any requirement that the censor bear the burden of instituting proceedings on a final, not provisional, basis and without any provision for prompt judicial review. DAETC Br. 36-38.

CONCLUSION

For all the foregoing reasons, § 10 and its implementing regulations are unconstitutional. The judgment below should be reversed.

Respectfully submitted,

STEVEN R. SHAPIRO
MARJORIE HEINS
American Civil Liberties
Union Foundation
132 West 43d Street
New York, New York 10036
(212) 944-9800

CHARLES S. SIMS
Counsel of Record
PETER J.W. SHERWIN
Proskauer Rose Goetz
& Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioners

New York, New York
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